STATE OF MICHIGAN
IN THE SUPREME COURT

IN THE MATTER OF DESTINY HICKS and ELIJAH BROWN,

Minors.
_____/

Supreme Court No. 153786

Court of Appeals No. 328870

Wayne Circuit Court No. 12-506605

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Petitioner.

v

SHAWANDA BROWN,
Respondent-Appellee.
_____/

SUPPLEMENTAL BRIEF OF APPELLANT DEPARTMENT OF HEALTH AND HUMAN SERVICES

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STATEMENT OF QUESTIONS PRESENTED

In its July 26, 2016, order granting oral argument on whether to grant the application for leave to appeal or take other actions, this Court asked the parties to address three issues:

1. Whether the respondent-mother made a timely request for accommodation of her disability in the service plan prepared by the Department of Health and Human Services.

Respondent-mother's answer:	Yes.
The Department's answer:	No.
Lawyer-Guardian Ad Litem's answer:	No.
Trial Court's answer:	Did not answer.
Court of Appeals' answer:	Yes.

2. Whether the Department of Health and Human Services made "reasonable efforts to reunify the child and family," as required by MCL 712A.19a(2), given the respondent-mother's disability.

Respondent-mother's answer:	No.
The Department's answer:	Yes.
Lawyer-Guardian Ad Litem's answer:	Yes.
Trial Court's answer:	Yes.
Court of Appeals' answer:	No.

3. Whether the failure to provide a service plan that accommodates a respondent's disability may be grounds for reversal of a termination of parental rights on appeal, under either the Americans with Disabilities Act or under the Probate Code, MCL 712A.19a(2), where there is no determination that the trial court erred in finding grounds for termination under MCL 712A.19b(3) or that termination was in the best interests of the children under MCL 712A.19b(5).

Respondent-mother's answer:	Yes.
The Department's answer:	No.
Lawyer-Guardian Ad Litem's answer:	No.
Trial Court's answer:	Did not answer.
Court of Appeals' answer:	Yes.

INTRODUCTION

The paramount purpose of the Probate Code is to safeguard the well-being of children. This principle informs this Court's analysis of termination actions brought by the Department of Health and Human Services against parents – even those with limited mental abilities – who have neglected or abused their children. The case of Shawanda Brown is a sad one, but the trial court properly terminated her parental rights to her two children as she was unable to care for them after receiving more than two years of services because of her depression and cognitive limitations, as well as because she left the state in 2015. This Court should reverse the decision of the Court of Appeals. In addition, the Department provides the following answers to the three questions posed by the Court.

First, Brown failed to preserve any claim that the services provided by the Department were inadequate because they were not particularized to accommodate her disabilities and thus violated the Americans with Disabilities Act. Such a request only came 18 months and 15 months after the service plans were established with respect to her children. That is not a timely objection. This Court needs to address the issue because the decision below considers the claim timely despite the fact that prior precedent of the Court of Appeals, *In re Terry,* 240 Mich App 14, 26, 27 n 5 (2000), stated that such a claim must be raised "when a service plan is adopted or soon afterward" or the claim is otherwise waived. The decision below purported to follow *Terry* but its reasoning does not follow the prior analysis. This Court's review is necessary.

Second, the Department provided services that were reasonably responsive to Brown's disability. Several of the services were specifically individuated to Brown, but she nonetheless failed to benefit meaningfully from them. In particular, she received a psychological and psychiatric evaluation, and participated in individual therapy for her depression, receiving medication, but after a year of therapy, her progress was limited and she threatened suicide resulting in in-patient psychiatric treatment. She also participated in educational programming and obtained her GED, but she continued to struggle with reading, and even with assistance in filling out job forms, remained unemployed. And she received parenting classes as well as help from a parent-partner, and one-on-one assistance from case workers, but did not make progress in her ability to care for the children unsupervised. She was unable to find suitable housing, and no family members were available to provide care or housing for the children. Brown left Michigan in July 2015, with no plans to return, effectively abandoning the children. The Court of Appeals engaged-in classic second guessing, indicating that the Department could have done more. But that is always the case. The claim that Brown was left to fend for herself is untrue.

Third, the duty to provide reasonable services is ordinarily a precondition under the Probate Code for the Department before it may ask a court to make a determination whether grounds exist for termination under MCL 712A.19b(3). While the Department makes reasonable accommodations for the disabled, the Americans with Disabilities Act does not provide a basis for relief.

This Court should reverse the Court of Appeals' order.

COUNTER-STATEMENT OF FACTS

In April 2012 Child Protective Services began investigating Shawanda Brown's family and found that she and her three-month-old baby, Destiny Hicks, were living with Brown's mother and her mother's boyfriend, a registered sex offender. (1/28/2013 Hr'g Tr, pp 10-11.) Brown's minor siblings were removed from the home and Brown admitted that other than that home, she was without housing for her child. (1/28/2013 Hr'g Tr, p 11.) She also told the worker she was overwhelmed, unemployed, and unable to care for the baby alone. (1/28/2013 Hr'g Tr, pp 11-12.) Thereafter, her worker spent many hours with Brown and suspected she was cognitively delayed. (4/25/2012 Hr'g Tr, pp 7-10; 1/28/2013 Hr'g Tr, pp 10-11.) After Brown declined a family friend's offer for housing and with no relatives available, the Department filed a petition for temporary custody of the baby. (4/25/2012 Hr'g Tr, pp 7-10; 5/7/2012 Hr'g Tr, pp 7-8; Petition No. 12004480 filed 4/25/2012; Amended Petition Nos. 12-004480 filed 5/8/2012 and 5/29/2012.)

Destiny's father claimed Native American ancestry prompting a Department investigation and he demanded a jury trial, both of which delayed the proceedings. (5/7/2012 Hr'g Tr, pp 5-6, 10; 11/15/2012 Hr'g Tr, pp 6-7.) In the interim, Destiny remained in a non-relative foster home and Brown was allowed supervised visits. (4/25/2012 Hr'g Tr, pp 8-10.) Brown, however, went eight months without visiting the baby. (5/7/2012 Hr'g Tr, pp 10-11; 1/28/2013 Hr'g Tr, p 27.)

Brown did not appear for the custody hearing. (1/28/2013 Hr'g Tr, p 3.) Her workers testified that when the case began, Brown said she was overwhelmed with caring for Destiny. (1/28/2013 Hr'g Tr, pp 11-12.) Although unsuccessful, one

worker spent several hours looking for housing and/or relatives so Brown could keep Destiny in her care. (1/28/2013 Hr'g Tr, pp 10-11.) Brown remained without permanent housing at the time of the hearing. (1/28/2013 Hr'g Tr, p 11, 27-29.)

The Department was seeking temporary custody of Destiny because of Brown's expressed inability to manage the baby's daily needs, and since conversations with Brown revealed she had cognitive delays or mental health problems, that limited her ability to function. (1/28/2013 Hr'g Tr, pp 18-19, 29-30.) For example, the worker said Brown did not seem to know how to engage her then one-year-old Destiny, requiring the worker to make suggestions about appropriate play activities with the child and when to change her diaper. (1/28/2013 Hr'g Tr, pp 29-30, 35, 37-38.) The worker described another time when Brown allowed Destiny to crawl out the room where they were visiting. (1/28/2013 Hr'g Tr, p 30.)

The court took jurisdiction of Destiny and recognized Brown had some mental health issues after she appeared for hearings and found she was unable to care for a child. (1/28/2013 Hr'g Tr, p 43; Order of Adjudication entered 1/29/2013.) It ordered Brown to obtain her GED and participate in parenting classes and individual therapy. (1/29/2013 Hr'g Tr, pp 3-43; Order of Disposition entered 1/29/2013.) It also ordered her to participate in Clinic, psychological, and psychiatric evaluations. (Order of Disposition entered 1/29/2013; Order of Disposition entered 1/29/2013.) The court encouraged Brown to identify relatives that could care for Destiny. (1/29/2013 Hr'g Tr, pp pp 7-8.) It also found that the Department made reasonable efforts to reunite the family up to that point by offering Brown counseling and

parenting classes. (Order Following Dispositional Review/Permanency Planning Hearing entered 1/29/2013.)

About a week after the court took jurisdiction of Destiny, Brown gave birth to a second child, Elijah Brown. Given that Brown was working on her treatment plan for Destiny, was still without housing and no one came forward to care for him, the Department sought temporary custody of Elijah too. (2/13/2013 Hr'g Tr, pp 5-8; Petition No. 13-001347 filed February 13, 2013.) During the preliminary hearing, Brown's maternal aunt expressed an interest in caring for Brown and her children. The worker recommended Elijah be placed with a non-relative foster parent until her aunt could be assessed. (2/13/2013 Hr'g Tr, p 11.) The court found that the Department made reasonable efforts by continuing to offer treatment services and conducting a Family-Team meeting. (2/13/2013 Hr'g Tr, pp 7-8; 2/26/2013 Hr'g Tr, pp 11-12; Order After Preliminary Hearing entered 2/13/2013.)

Like in the case for Destiny, Brown admitted to the Department's allegation that she was unable to adequately care for Elijah, during the custody hearing. (4/9/2013 Hr'g Tr, p 5.) She admitted that she was without housing or income to properly parent, had an eighth grade education and was working toward her GED, had been diagnosed with depression in the past, and continued to work on her treatment plan services for Destiny. (4/9/2013 Hr'g Tr, pp 8-14.) Taking judicial notice of its file, the court took jurisdiction of Elijah. (4/9/2013 Hr'g Tr, pp 4-5, 17; Order of Adjudication entered 4/10/2013.) It ordered Brown to continue the parenting classes, counseling, psychological evaluation that were ordered in the

case involving Destiny. (4/9/2013 Hr'g Tr, pp 14-19; Order of Disposition entered 4/10/2013.) The court again found that the Department made reasonable efforts to prevent Elijah's removal by offering Brown treatment plan services in the past. (4/9/2013 Hr'g Tr, p 20; Order Following Dispositional Review/Permanency Planning Hearing entered 4/10/2013.)

Brown completed a court-ordered clinic evaluation. When she met with the clinician, she said she asked the Department for help with Destiny because she did not have proper housing. She admitted that she remained unstable when Elijah was born but now hoped to obtain housing and income to be able to support the children. (Clinic Evaluation admitted 4/23/2013, p 3.) The clinician found Brown had cognitive limitations and that her memory was impaired. (Clinic Evaluation admitted 4/23/2013, p 4.) Brown said she was diagnosed with depression in the past and admitted she was not taking medication at the time of the evaluation. (Clinic Evaluation admitted 4/23/2013, p 3.) The clinician observed Brown's interactions with her children and found them to be satisfactory. (Clinic Evaluation admitted 4/23/2013, p 5.) Brown accepted direction, but the clinician recommended she continue parenting classes. (Clinic Evaluation admitted 4/23/2013, p 5.)

The clinician concluded that Brown's prognosis for reunification with her children was fair. (Clinic Evaluation admitted 4/23/2013, p 6.) Brown's depression impacted her ability to care for her children. Since she had recently resumed therapy, however, Brown was improving. (Clinic Evaluation admitted 4/23/2013, p 6.) The clinician recommended monitoring Brown to see if she benefited from her

treatment plan services. (Clinic Evaluation admitted 4/23/2013, p 6.) The clinician also recommended Brown receive psychiatric care for her depression and to identify whether she required medication. (Clinic Evaluation admitted 4/23/2013, p 6.) The clinician found Brown required support from a parent mentor and therapist before her children should return to her care. (Clinic Evaluation admitted 4/23/2013, p 6.)

Brown completed a psychological evaluation as a part of her treatment plan. The psychologist immediately observed Brown had cognitive deficits and limited insight. (Psychological Report admitted 7/23/2013, p 1.) Brown told the psychologist that she did not have any schooling after eighth grade but had never received special education services. (Psychological Report admitted 7/23/2013, p 2.) The psychologist did not see any evidence of psychosis or a thought disorder. (Psychological Report admitted 7/23/2013, pp 1-2.) But she did have minimal thinking abilities, extremely low verbal reasoning skills, and low non-verbal reasoning skills, and an extremely low ability to temporarily retain and reproduce information. (Psychological Report admitted 7/23/2013, pp 2-3.) She also demonstrated minimal insight into common childcare situations. (Psychological Report admitted 7/23/2013, p 3.)

Brown told the psychologist that she and Destiny were homeless immediately before Destiny entered foster care because they were living with Brown's mother until her mother's boyfriend objected. (Psychological Report admitted 7/23/2013, p 1.) She admitted that she had never worked and was without an income. (Psychological Report admitted 7/23/2013, p 2.) Since beginning treatment services,

Brown reported feeling a benefit from outpatient therapy. (Psychological Report admitted 7/23/2013, p 2.)

The psychologist concluded that Brown's low cognitive functioning could interfere with her judgment and decision making abilities. (Psychological Report admitted 7/23/2013, p 2.) The psychologist found she would likely be unable to find appropriate solutions for common childcare situations and that her ability to independently manage more complex activities of daily living was limited. (Psychological Report admitted 7/23/2013, p 3.) The psychologist opined she would have difficulty communicating with and redirecting children when necessary. (Psychological Report admitted 7/23/2013, p 3.) As examples, the psychologist identified Brown's limited ability to acknowledge her children's feelings, consider relevant history, or offer feedback when appropriate. (Psychological Report admitted 7/23/2013, p 4.) The psychologist recommended Brown begin individual therapy and parenting classes. (Psychological Report admitted 7/23/2013, p 4.)

Brown also underwent a psychiatric evaluation. She told the psychiatrist about her limited education, admitting that she was not a motivated student and "just sat quietly as the work passed her by." (Psychiatric Evaluation admitted 7/23/2013, p 3.) The psychiatrist noted during the testing that Brown struggled with her attentiveness. (Psychiatric Evaluation admitted 7/23/2013, p 3.) He found that her formal judgment was fair and her operational judgment was adequate. (Psychiatric Evaluation admitted 7/23/2013, p 4.) He recommended additional parenting classes, individual therapy, and that Brown be assigned a parent partner.

(Psychiatric Evaluation admitted 7/23/2013, pp 4-5.) Overall, he opined Brown had chronic clinical depression, required antidepressants, and her prognosis for improving was fair to guarded. (Psychiatric Evaluation admitted 7/23/2013, p 5.)

Over the following several months, Brown obtained housing and completed parenting classes. But the home where she was living was unsuitable for the children. (7/23/2013 Hr'g Tr, pp 5, 10-11; 10/15/2013 Hr'g Tr, pp 4-6, 8-9, 12-13; 1/15/2014 Hr'g Tr, pp 8; 5/13/2014 Hr'g Tr, p 4; 11/26/2014 Hr'g Tr, pp 4-5.) And despite parenting classes, one-on-one assistance from her worker and receiving help from a parent-partner, Brown never showed she was able to care for the children unsupervised. (4/23/2013 Hr'g Tr, pp 17-18; 1/15/2014 Hr'g Tr, pp 13-14, 19; 2/13/2014 Hr'g Tr, pp 5, 13.) Then, Brown stopped visiting the children consistently. (2/20/2015 Hr'g Tr, p 6.) The worker concluded Brown was unmotivated. (11/26/2014 Hr'g Tr, pp 9-10.)

Brown's mental health was addressed while she participated in treatment services. She participated in individual therapy after she was court ordered to do so. (1/15/2014 Hr'g Tr, p 11.) But in January 2014, after receiving services for a year, she threatened suicide and required in-patient psychiatric treatment. (1/15/2014 Hr'g Tr, pp 14-15.) Afterward, she resumed a therapy and medication regime but was inconsistent with her compliance. (2/13/2014 Hr'g Tr, pp 5-6.; 5/13/2014 Hr'g Tr, p 4.) She completed a GED program but her learning and cognition limitations remained. (1/15/2014 Hr'g Tr, p 16; 2/13/2014 Hr'g Tr, p 5; 8/13/2014 Hr'g Tr, p 10; 11/7/2014 Hr'g Tr, p 12.)

Throughout the case, the workers investigated whether there were any relatives available to care for Destiny and Elijah. (4/23/2014 Hr'g Tr, p 4; 11/7/2014 Hr'g Tr, pp 6-7; 11/26/2014 Hr'g Tr, pp 5-6.) In November 2014, the worker testified about her efforts to investigate Brown's grandmother as a potential caregiver for the children. The worker told the court Brown's grandmother was unsuitable since she admitted that if she were to obtain guardianship over the children she would actually return them to Brown. (11/26/2014 Hr'g Tr, pp 4-6.) Since the Department was unsuccessful in identifying a family member, the children remained in the same non-relative foster home. And the foster parents wanted to adopt the children. (7/3/2013 Hr'g Tr, p 10; 2/20/2015 Hr'g Tr, p 6; 5/20/2015 Hr'g Tr, pp 4-5.)

The court repeatedly found that the Department's efforts were reasonable. (1/15/2014 Hr'g Tr, p 20; 2/13/2014 Hr'g Tr, pp 12-13; 5/13/2014 Hr'g Tr, pp 5-6, 17-18; 8/13/2014 Hr'g Tr, pp 17-18; 11/7/2014 Hr'g Tr, p 17; 11/26/2014 Hr'g Tr, p 14; 2/20/2015 Hr'g Tr, p 17; 5/20/2015 Hr'g Tr, pp 16-17; 6/18/2015 Hr'g Tr, p 14; Orders Following Dispositional Review/Permanency Planning Hearing entered 4/23/2013; 7/23/2013; 10/15/2013; 1/15/2014; 2/13/2014; 5/13/2014; 8/13/2014; 11/26/2014; 2/20/2015; 5/20/2015; 6/18/2015.) Still, the court found that Brown perpetually wanted others to do her work. (2/20/2015 Hr'g Tr, p 16.) The court noted, however, that it was not the Department's responsibility to "tak[e] parents by the hand" and ensure they comply with and benefit from their treatment plan services. (5/13/2014 Hr'g Tr, p 16.) When Brown's attorney questioned whether she had been provided services to meet her individualized needs, the court found that the Department had

"tried everything" but Brown did not progress. (4/9/2013 Hr'g Tr, p 24; 2/20/2015 Hr'g Tr, pp 7-16.) After nearly three years, the court ordered the Department to pursue permanent custody of Destiny and Elijah. (11/26/2014 Hr'g Tr, pp 11-12; Order Following Dispositional Review/Permanency Planning Hearing entered 2/20/2015.)

During the termination hearing, Brown's worker testified. She said the children entered care because Brown was unable to provide them with adequate housing that Brown was provided treatment services, including parenting classes and individual therapy, for more than two years but did not comply with some services and had not benefited from any of the services. She completed parenting classes but during visits with the children needed prompting from the workers to ensure then three-year-old Destiny and two-year-old Elijah did not put objects in their mouths. (7/27/2015 Hr'g Tr, pp 10-11, 43-44.) She even needed prompting to interact with the children and was only able to handle one child at a time. (7/27/2015 Hr'g Tr, pp 43-44.) The worker described Brown as "childlike." (7/27/2015 Hr'g Tr, p 29.) The worker gave Brown one-on-one attention at every visit, but she never showed that she could keep the children safe because of the constant guidance she required. (7/27/2015 Hr'g Tr, pp 11-12, 20-21, 27.)

Brown was living out of state at the time of the termination hearing and advised that she intended to continue to do so. (7/27/2015 Hr'g Tr, pp 24-26.) Before then, she lived with her uncle and that home was unsuitable for the children. (7/27/2015 Hr'g Tr, pp 30-31.) And there were no family members available to care

for the children. (7/27/2015 Hr'g Tr, pp 31-32.) The worker testified that after Brown moved, the services ended. (7/27/2015 Hr'g Tr, pp 24-26.)

At the time of the termination hearing, the children were living with a non-related foster family and looked to them as their parents. (7/27/2015 Hr'g Tr, p 27.) The foster family wanted to adopt. (7/27/2015 Hr'g Tr, p 29.) When the case started, Destiny and Brown were bonded but that bond had diminished over the years. After three years in foster care, the children did not refer to Brown as their mother and did not show her much affection. (7/27/2015 Hr'g Tr, pp 27, 49-50.)

PROCEEDINGS BELOW

The trial court terminated Brown's rights to Destiny and Elijah and found it was in their best interests to do so. (7/27/2015 Hr'g Tr, pp 59-73; Order Terminating Parental Rights entered 7/27/2015.) It noted that it had presided over the case for "a long time" and that Brown did have cognitive delays but more notably her problem was her lack of motivation despite rehabilitative services and intensive support. (7/27/2015 Hr'g Tr, pp 60-61, 64.) The court concluded that Brown was unable to care for the children and was without adequate housing for them. (7/27/2015 Hr'g Tr, pp 61-62.) It noted the lack of evidence that Brown would be able to provide for the children within a reasonable time. (7/27/2015 Hr'g Tr, p 65.) The court found that the children were placed in the same foster home and had a strong bond with the foster family compared to the weaker bond with Brown in support of its finding that termination was in their best interests. (7/27/2015 Hr'g Tr, p 67, 70.)

In a published opinion issued April 27, 2016, the Court of Appeals vacated the termination order against Brown. The court found that the Department did not fulfill its duty to provide Brown with an individually tailored treatment plan that included services geared toward those with intellectual limitations. It remanded the case directing the Department to provide services with reasonable accommodation made for Brown's cognitive impairment.

The lawyer-guardian ad litem representing Brown's children on appeal filed an application for leave to appeal to this Court on May 24, 2016, explaining that the Court of Appeals erred in its decision since Brown waived her ADA claim, that the Department made reasonable efforts to reunite her with the children, and that the Court of Appeals contradicted the children's statutory rights when it emphasized Brown's interests over their interests in safety and permanency. This Court issued an order on July 26, 2016 granting oral argument on whether to grant the application or take other action and directing the parties to draft briefs addressing three issues that the Department address here.

ARGUMENT

I. Because Brown did not raise an objection below regarding the Department's reunification efforts, the Court of Appeals erred in finding that she preserved appellate review of the issue.

Under the ordinary standards of review, a parent must raise a timely objection to preserve a claim, and this principle applies equally to cases in which a parent with a disability seeks to challenge the adequacy of the services provided by the Department. Brown failed to preserve this issue, and the Court of Appeals erred in holding otherwise.

A. The law requires a timely objection to preserve this claim.

Generally, the Department must make reasonable efforts to reunite a family after children are removed from their parent. MCL 712A.19a(2); *In re Mason*, 486 Mich 142, 152 (2010). To preserve the issue of whether the Department made reasonable efforts on appeal, a timely objection must be made in the trial court, allowing an opportunity to correct the error. *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 7 (1995).

When preserved, the issue is reviewed for clear error. *In re Fried*, 266 Mich App 535, 542 (2005). But a claim that the Department did not make reasonable efforts is waived when a parent fails to object to the trial court's finding that the Department made such efforts. See *In re Terry*, 240 Mich App 14, 26, 27 n 5 (2000). Likewise, a parent claiming that the Department failed to accommodate her disability under the Americans with Disabilities Act must raise such a claim in a timely manner "so that any reasonable accommodations can be made." *In re Terry*,

240 Mich App at 26. To be timely raised, the claim must be made when the service plan is adopted or shortly thereafter so that the court may address it. *Id.* at 26-27. Waiting until or after a termination hearing is too late, and the issue is waived. *Id.* at 27, n 5 ("the failure to timely raise the issue constitutes a waiver").

B. Brown waived this claim under Michigan law, and the Court of Appeals erred in concluding that she preserved the claim.

Brown did not raise an objection below regarding the Department's reunification efforts and has failed to preserve the issue. The Court of Appeals acknowledges that Brown's attorney did not raise an ADA challenge at the time the service plan was adopted. In fact, the trial court repeatedly found that the Department's efforts were reasonable and Brown could have appealed those findings, but she did not. (1/15/2014 Hr'g Tr, p 20; 2/13/2014 Hr'g Tr, pp 12-13; 5/13/2014 Hr'g Tr, pp 5-6, 17-18; 8/13/2014 Hr'g Tr, pp 17-18; 11/7/2014 Hr'g Tr, p 17; 11/26/2014 Hr'g Tr, p 14; 2/20/2015 Hr'g Tr, p 17; 5/20/2015 Hr'g Tr, pp 16-17; 6/18/2015 Hr'g Tr, p 14; Orders Following Dispositional Review/Permanency Planning Hearing entered 4/23/2013; 7/23/2013; 10/15/2013; 1/15/2014; 2/13/2014; 5/13/2014; 8/13/2014; 11/26/2014; 2/20/2015; 5/20/2015; 6/18/2015.) At the termination hearing, the trial court found that the Department "tried everything" but that Brown was not progressing. (2/20/2015 Hr'g Tr, pp 17-18.) Brown never objected to the trial court's numerous findings that the Department had made reasonable efforts to reunite the family. Nor did she appeal its orders. She waived the claim on appeal.

The Court of Appeals erred when it found that Brown's attorney's inquiry into one-on-one parenting help ten months before the termination amounted to a timely objection to the trial court's finding that reasonable efforts had been made. The trial court found ten months before the Department filed for permanent custody of the children, and continuously thereafter, that the Department had made reasonable efforts. (1/28/2013 Hr'g Tr, pp 10-11; 4/23/2013 Hr'g Tr, pp 17-18; 1/15/2014 Hr'g Tr, pp 13-14, 19; 2/13/2014 Hr'g Tr, pp 5, 13.) Brown's attorney's inquiry into one-on-one parenting help ten months before the termination hearing, was not an objection to the court's finding and does not amount to a claim that her disability had not been accommodated. In fact during the hearing referenced by the Court of Appeals as the point when Brown "objected," the trial court found that Brown had made some progress in the therapy provided by the Department. (8/13//2014 Hr'g Tr, pp 17-18.) Appellate courts are obliged to defer to a trial court's factual findings at termination proceedings if those findings do not constitute clear error and that the trial court made a mistake. *In re Rood*, 483 Mich 73, 90 (2009); see also MCR 3.977(K). The Court of Appeals failed to do so here.

Rather, the Court of Appeals erred in finding that the reasonable efforts issue was preserved for appellate review and since it was unpreserved, the Court of Appeals should have found that the claim was waived under *Terry*.

II. The Court of Appeals erred when it found that Department failed to make reasonable efforts to reunify Brown and her children when it offered her individual and general rehabilitative services.

The Department is required to make reasonable efforts to rectify the conditions that caused the children's removal by adopting a service plan. MCL 712A.18f(1), (2), (4); *In re Terry*, 240 Mich App at 25-26. The ADA requires a public agency, such as the Department, to make reasonable accommodations for individuals with disabilities so that they may receive benefits of public programs and services. *Id*. at 25. But there is also the commensurate responsibility on the part of the parent to participate in the services that are offered and demonstrate that they sufficiently benefited from the services provided. *In re Gazella*, 264 Mich App 668, 676–677 (2005). The ADA does not require petitioner to provide respondent with full-time, live-in assistance with her children. *In re Terry*, 240 Mich App at 27-28, citing *Bartell v Lohiser*, 12 F Supp 2d 640, 650 (ED Mich, 1998).

The Court of Appeals erred when it found that the Department failed to comply with its requirement even though it offered Brown parenting classes, one-on-one assistance, a parent partner, and psychological counseling for almost three years. (4/23/2013 Hr'g Tr, pp 17-18; 1/15/2014 Hr'g Tr, pp 13-14, 19; 2/13/2014 Hr'g Tr, pp 5, 13.) All of which would have assisted in preserving and reunifying her family, and would have alleviated or mitigated the conditions that caused the children to be in care, had she participated in or benefited from the services. The record shows that Brown's cognitive limitations were acknowledged by the Department and the trial court throughout the case. (4/25/2012 Hr'g Tr, pp 7-10; 1/28/2013 Hr'g Tr, pp 10-11, 18-19, 29-30, 43; Order of Adjudication 1/29/2013.)

For example, the trial court found that the worker acknowledged that Brown had difficulty with reading and writing and that the worker intensively assisted with completing forms and applications for employment and services to no avail. (11/7/2014 Hr'g Tr, pp 9-11; 7/27/2015 Hr'g Tr, 59-60.) The trial court also found that Brown had not benefited from the parenting classes she was provided, and would be unable to do so within a reasonable time. (7/27/2015 Hr'g Tr, pp 61.) It concluded that Brown removed herself from the ability to receive services when she moved out of state. (7/27/2015 Hr'g Tr, p 61.) Again, appellate courts are obliged to defer to a trial court's factual findings. *In re Rood*, 483 Mich at 90; MCR 3.977(K). The trial court did not clearly err when it found that the Department acted reasonably to accommodate Brown's disability.

In concluding otherwise, the Court of Appeals effectively concluded that there was only a single method by which to provide adequate services, ruling that the Department failed her by neglecting to enroll her in a "wrap-around" service program for the cognitively impaired by one of the service agencies. See *Hicks,* slip op, p 17. But this is not an absolute requirement to determine whether the Department provided adequate services. The Department specifically gave Brown individualized services, namely the parent-mentor and the medical services as well as the one-on-one assistance given by the case workers. These were reasonable efforts, and the Court of Appeals' requirement for more is not mandated by the Probate Code or even the ADA. The key to the analysis is reasonableness, and the Department acted so to assist Brown, but she is still unable to care for her children.

III. Consistent with the Probate Code, the Department is required to make a reasonable accommodation for a parent's disability where necessary to make reasonable efforts at reunification, but the ADA provides no basis to reverse a termination decision.

The Probate Code requires that the Department seek to reunify a child with the child's parents as one of the central goals of child welfare law. And where a parent is suffering from a disability, the Department recognizes as a matter of policy and federal law that it must "make all programs and services available and fully accessible to persons with disabilities." *Children's Foster Care Manual,* "Special Accommodations," pp 1–2.[1] In this way, in a case with a disabled parent, the Department's obligation to make reasonable accommodations for the disabled parent will be a part of the statutory duty to make "reasonable efforts" unless one of the enumerated exceptions apply. MCL 712A.19a(2). Where the Department fails to do so, this failure will ordinarily foreclose the Department's ability to prove that the grounds for termination were established. For Brown, as already argued, the Department met its obligation and she was not entitled to relief under the Code.

At the same time, the ADA does not provide a basis for relief for a disabled parent for any failure to make reasonable accommodations. While the Department has adopted the federal standards, the ADA does not provide for a basis for reversing a decision terminating a parent's rights. Any relief would come from the Michigan Probate Code. For Brown, the Department made reasonable accommodations of her disability.

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[1] This document is available at the following web address: http://dhhs.michigan.gov/OLMWEB/EX/FO/Public/FOM/722-06F.pdf#

A. The Probate Code provides a basis for relief for the failure to make a reasonable accommodation where it resulted in a failure to make reasonable efforts at reunification.

As a practical matter, the duty to make reasonable efforts at reunification subsumes the duty to make reasonable accommodations for parents with disabilities. By statute, the Department has an obligation to seek to reunify a child with that child's parent:

> Reasonable efforts to reunify the child and family must be made in all cases except [in enumerated circumstances.] [MCL 712A.19a(2).]

The exceptions include the situation where the parent has subjected the child to "aggravated circumstances" under MCL 722.638 (listing of abandonment and serious crimes), convicted of a homicide of another child, had rights to the child's siblings involuntarily terminated, or is required to register as a sex offender. *Id.*

The clear import of this enumerated list is that otherwise the Department has this obligation to establish a service plan and provide the necessary services to resolve the circumstance that gave rise to the court taking jurisdiction over the children. *In re Mason,* 486 Mich 142, 152 (2010) (quoting MCL 712A.19a(2) and noting that the obligation to make reasonable efforts applies to " '*all* cases' except those involving aggravated circumstances") (emphasis in original). The corollary principle that the courts have generally recognized is that reasonable efforts are a precondition to seeking to terminate a parent's rights and only where the efforts fail may the Department seek termination. *Id.* at 152 (where DHS failed to make reasonable efforts to reunify child with parent, the parent was denied "meaningful" opportunity to participate and termination therefore was "premature").

This conclusion aligns with the listing of fourteen grounds for termination in MCL 712A.19b(3), organized (a) through (n) with subcategories, because these grounds generally require a showing that the parent has been unable to overcome the circumstances that caused the Department to seek court jurisdiction in the first place. In the present case, the trial court terminated Brown's rights under § 19b(c)(*i*) ("conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age) and § 19b(g) ("fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age"). For the Department to show that Brown was both unable to rectify the conditions and unable to provide proper care and custody, it was necessary to show that she failed to improve and is unable to care for her children.[2]

By policy, the Department has concluded that federal law requires it to make reasonable accommodations for those with disabilities:

> MDHHS must provide appropriate services; policies, practices and procedures, which must include making reasonable accommodations. *Federal law requires MDHHS to make all programs and services available and fully accessible to persons with disabilities*; see the Non-Discrimination in Service Delivery document for a complete definition of protected persons. MDHHS may not use policies or procedures for operating programs that have the effect of excluding or discriminating against persons with disabilities; see Non-Discrimination in Service Delivery. [*Children's Foster Care Manual*, "Special Accommodations," pp 1 – 2 (emphasis added); see n 1 *supra*.]

[2] The Code provides that the court may order the Department to seek termination if the children have been in foster care for 15 of the last 22 months. MCL 712A.19a(6).

This "non-discrimination policy" is a ten-page document in which the Department provides information regarding who is a qualified person, and includes the statement that "DHS must furnish reasonable accommodations if necessary to afford a qualified individual with a disability an equal opportunity to participate in, and receive the benefits of available services, programs, or activities." Non-discrimination policy, p 2.[3]

The policy grows from the American with Disabilities Act, which provides legal protections to the disabled. Article II of the Act governs public agencies, and provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 USC 12132. As the Court of Appeals held more than 15 years ago, the ADA requires public agencies like DHHS to make "reasonable accommodations for those individuals with disabilities so that all persons may receive the benefits of public programs and services." *In re Terry,* 240 Mich App at 25. Therefore, the Department's duty to make reasonable accommodations for a disabled parent is merely part of its statutory duty to make reasonable efforts to reunite the family. *Id.* ("if the FIA fails to take into account the parents' limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family"). Reasonableness is the unifying thread.

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[3] This document may be found at the following web address:

http://www.michigan.gov/documents/dhs/Non-Discrimination_in_Service_Delivery_410968_7.pdf

One caveat to this point. Just as there are some parents for whom no efforts would enable them to safely care for children, see MCL 712A.19a(2) (e.g., parents who abandoned other children), there are also some who are disabled who will never be able to care for children regardless of the level of services provided, regardless of reasonable efforts or accommodation. See *In re Terry*, 240 Mich App at 28 ("if a parent cannot or will not meet her irreducible minimum parental responsibilities, the needs of the child must prevail over the needs of the parent) (citation omitted).

While not implicated by this case, for those parents the Department may seek termination immediately without providing services, just as the Department may seek to place custody of a child outside the child's parents' custody without providing services in certain circumstances. See MCL 712A.18f(1)(b) (in seeking placement under MCL 712A.2(b) outside the parent's custody, the report should note "[i]f services were not provided to the child and his or her parent, guardian, or custodian, the reasons why services were not provided"). Thus, the Probate Code only requires that the court state whether "reasonable efforts have been made to prevent the child's removal" before making a determination about custody, but does not condition the decision on this determination. See MCL 712A.18f(4).[4]

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[4] MCL 712A.18f(4) provides in pertinent part:

> Before the court enters an order of disposition, the court shall consider the case service plan; any written or oral information offered concerning the child from the child's parent . . . ; and any other evidence offered . . . . The order of disposition shall state whether reasonable efforts have been made to prevent the child's removal from his or her home or to rectify the conditions that caused the child's removal from his or her home.

Nonetheless, the general point remains that the Department has an obligation to make reasonable efforts to reunite the family, and these efforts include reasonable accommodations for disabled parents. This occurred here.

As already noted, Brown never was able to manage the children's safety and well-being alone. Throughout the case, she relied on the workers' prompts for when to change a diaper, how to engage them, and how to protect them. (1/28/2013 Hr'g Tr, pp 29-30, 35, 37-38.) She was like a child herself, and consequently lacked the capacity to adequately care for and protect Destiny and Elijah. (7/27/2015 Hr'g Tr, p 29.) And by the time of the termination hearing, Brown had moved out of state, abandoning the children altogether. Because she cannot meet their basic needs despite the Department's reasonable efforts, termination of her parental rights was warranted. *In re Terry*, 240 Mich App at 28. This Court should reverse.

B. The American with Disabilities Act does not provide a basis for relief even though it requires that the Department make reasonable accommodations for parents with disabilities.

While the Department accepts that the ADA requires it to offer reasonable accommodations to disabled parents, the ADA does not provide an independent basis for relief in child welfare cases involving the termination of parental rights, because the standard in determining whether the Department provided sufficient services is a reasonableness standard evaluated separate from the ADA. This has been the rule in Michigan since the *Terry* decision more than 15 years ago, and is the majority rule from the other States. Any basis for relief in such a matter arises from Michigan's Probate Code.

While the Department has accepted that the ADA requires it to make reasonable accommodations, the ADA does not provide a defense in termination hearings. The analysis turns on the meaning of the anti-discrimination provision of Article II of the ADA, which includes the phrase "services, programs, or activities of a public entity." 42 USC 12132. The Court of Appeals in *Terry,* 240 Mich App at 570, concluded the termination-of-parental rights proceedings were not included within this ambit and then held that an ADA claim would not provide a defense:

> We agree that termination of parental rights proceedings do not constitute "services, programs or activities" within the meaning of 42 U.S.C. 12132. Accordingly, we hold that a parent may not raise violations of the ADA as a defense to termination of parental rights proceedings. [*Id.*]

Terry also held that the question whether the Department made reasonable efforts is reviewed "without reference to the ADA." *Id.* This is the majority rule. See *SG v Barbour County Dep't of Human Resources,* 148 So3d 439, 447 (Ala Civ Appeal 2013) ("Consistent with the majority of courts that have considered ADA challenges to termination-of-parental-rights proceedings, we hold that a termination-of-parental-rights proceeding is not a service, program, or activity within the meaning of the ADA and that, therefore, the ADA does not apply to such a proceeding."). See also *In re BS,* 166 Vt 345, 351 (1997) ("The family court ruled that ADA noncompliance is not a defense. We agree."). But see *In re CM,* 996 SW2d 269, 270 (Tex App 1999) ("[The ADA defense] is an affirmative defense that must be pleaded to avoid waiver"). The seminal case for the point that the ADA does not apply to termination proceedings comes from a decision by the Hawaii Supreme Court. See *In re Doe,* 100 Haw 335; 342 (2002). This Court should adopt these holdings from *Terry*.

Even so, Michigan law requires reasonable efforts at reunifying the family, which the Department agrees includes reasonable accommodations. The real import of the principle is that this Court should look to Michigan law and the Probate Court to determine whether the Department has acted reasonably. In adopting the analysis of reasonable accommodation requires a review of whether "the services were individualized," the Court of Appeals adopted a reasonable standard. See *Hicks,* slip op, p 11. But even it recognized that in circumstances in which "no level or type of service could possibly remediate the parent to . . . care safely for the child, termination need not be unnecessarily delayed." *Id.* at 16.

Yet, beyond its errors related to the preservation rules noted above, the Court of Appeals also misapplied the general principles about reasonable efforts by overlooking the significant individualized services provided to Brown from 2013 through July 2015, including most notably medical services, parent-partner assistance, and the help of the case workers. The court did not fully address the point that Brown left Michigan in July 2015, effectively abandoning the children. The fact that other more specialized services may have been available does not alter the fact that the Department made reasonable efforts to reunify the family here.

The truth is that Shawanda Brown did not make progress in her ability to care for her children and is not going to make the necessary progress. Sadly, her significant cognitive limitations and depression have left her "childlike" and unable to care for her children. (7/27/2015 Hr'g Tr, pp 29-30.) And now more than four years later, no one is served by returning them to her. This Court should reverse.

CONCLUSION AND RELIEF REQUESTED

This Court should grant leave and reverse the decision of the Court of Appeals.

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